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Beys, Stein & Mobargha LLP

Nader Mobargha

**TO BE FILED UNDER SEAL**

March 21, 2011

**BY HAND DELIVERY AND FACIMILE (718) 613-2236**

The Honorable I. Leo Glasser  
United States District Judge  
Easter District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

RECEIVED  
3/23/11  
Chambers of  
I. Leo Glasser  
U.S.D.J.

**Re: United States of America v. Felix Sater  
Criminal Docket No. 98 CR 1101 (ILG)**

Dear Judge Glasser:

We represent Defendant Felix Sater in the above-captioned matter and write in response to Mr. Lerner's letter, dated February 3, 2011, demanding that the Court "immediately docket all events that have occurred in this case from its inception," and to the Government's letter in response, dated March 17, 2011 (the "March 17<sup>th</sup> Letter").

**PRELIMINARY STATEMENT**

In brief, we believe that the District Court no longer has jurisdiction to hear issues concerning the unsealing of the docket in the above-referenced criminal proceeding because the matter is currently pending before the Court of Appeals. Last month, Richard Roe ("Roe") filed a Petition for a Writ of Mandamus with the Second Circuit requesting that it order the District Court to unseal the docket. In denying Roe's petition on February 14, 2011, the Second Circuit ordered that "[t]he docket in this proceeding (Docket No. 11-479) and all documents referenced therein shall remain SEALED until further order of this court." See Exhibit ("Ex.") 1, Summary Order, dated February 14, 2011 ("Summary Order"), at 3:24-25 (emphasis added).

Even if this Court retains jurisdiction over this matter, the interests of Felix Sater in keeping the docket sealed far outweigh any interest of Richard Roe, as a private litigant in a civil action, in unsealing it. Sater's interest in keeping the docket sealed is extremely high: Any

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disclosure of his cooperation with the Government against infamous organized crime families and international terrorists would pose a substantial probability of prejudice to the safety of Sater and his family.

The Government recognizes this risk, but believes it can still unseal a portion of the docket. Specifically, in its March 17<sup>th</sup> Letter, the Government seeks to unseal “specific docket entries and documents that do not directly reference [Sater’s] cooperation.” See March 17<sup>th</sup> Letter, at 2. However, unsealing any docket entries – including those that do not directly reference Sater’s cooperation – would *indirectly* reveal the fact of Sater’s cooperation, an unacceptable result by the Government’s own standard. Consequently, to the extent the Court retains jurisdiction over the matter, it should deny the Government’s application.

### FACTUAL BACKGROUND

Felix Sater cooperated with the Government for 11 years, providing them information of national and international consequence about New York City’s and the World’s most dangerous criminal organizations. The organizations are a who’s who of violence and terrorism, both on a local and international level. They include: (i) Al Qaeda; (ii) La Cosa Nostra; (iii) the Gambino, Genovese and Bonanno organized crime families; and (iv) leaders in Afghanistan. Sater’s cooperation over this 11-year span includes, but is not limited to, the following:

- La Cosa Nostra: Sater provided information crucial to the conviction of over 20 individuals, including those responsible for committing massive financial fraud, members of La Cosa Nostra (“LCN”) and international cyber-criminals.
- Gambino, Genovese and Bonanno Organized Crime Families: [REDACTED]  
[REDACTED] In part based on information provided by Sater, in March 2000, a federal grand jury returned a RICO, securities fraud and money laundering indictment against 19 of the most important participants in extensive fraud schemes, including some with high-ranking positions in the Gambino, Genovese and Bonanno Organized Crime Families.
- Arms dealers in Afghanistan: Sater relayed information regarding the willingness by leaders in Afghanistan to sell Stinger missiles.
- Al Qaeda: Sater passed on specific information about key leaders in Al Qaeda and affiliated groups, including information that could help the Government locate those individuals.

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- Post 9/11 Al Qaeda: Following September 11, 2001, Sater traveled back to the Middle East at the direction of the FBI and gathered additional valuable intelligence regarding Al Qaeda and affiliated groups.<sup>1</sup>

The Government itself recognizes that “Mr. Sater’s cooperation was of an extraordinary depth and breadth, almost unseen, at least in the United States Attorney’s office.” See Ex. 2, Transcript of February 14, 2011 Oral Argument before Second Circuit (“Transcript”), at 12:12-15. As a result, during the past 13 years, the Government has gone to extraordinary lengths to keep both Sater’s conviction, the fact of his cooperation, and the details of his cooperation under seal. Despite this effort, however, some of this information has leaked into the public sphere. Articles in both the *New York Times* and *Businessweek* mention Felix Sater by name, discuss his role in the RICO conspiracy, and speculate about his conviction.

In addition, we have recently learned that over 11 years ago, in a March 2, 2000 press release announcing the indictment of 19 other defendants on RICO charges, the Government inadvertently disclosed Sater’s identity in a footnote and that he had pleaded guilty to RICO charges, a fact that the Government had gone to extraordinary lengths to keep under seal for 13 years.

### ARGUMENT

#### **I- The District Court no longer has jurisdiction over the sealing of the docket in criminal proceedings**

As a threshold matter, we believe that the District Court does not have jurisdiction to determine whether its docket should be sealed; the matter is now before the Second Circuit. Recently, the Second Circuit ordered that “[t]he docket in this proceeding (Docket No. 11-479) and all documents referenced therein shall remain SEALED until further order of this court.” See Ex. 1, Summary Order, at 3 (emphasis added).

At a February 14, 2011 oral argument, the Second Circuit acknowledged that there were two cases before it, Docket No. 10-2905-cr and Docket No. 11-479-cr. Docket No. 10-2905-cr involves Roe’s appeal from this Court’s order “permanently enjoining distribution of the Presentence Investigation Report and temporarily enjoining Roe and his clients from further disseminating other sealed documents filed in Sater’s criminal proceedings before the District Court.” See Ex. 1, The Summary Order, at 2. Docket No. 11-479 concerns Roe’s “consolidated petition for a Writ of Mandamus directing the court to make public the docket of this criminal case.” *Id.* (emphasis added). Roe’s Petition for a Writ of Mandamus – which the Second Circuit ultimately denied – officially brought the issue of whether the docket should remain sealed before

<sup>1</sup> The substance of these facts were taken from the Government’s Declaration in Support of Motion to Leave to File a Supplemental Memorandum, dated February 2, 2011.

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the Second Circuit. Consequently, the question of whether to unseal the docket in this criminal proceeding is now squarely before the Second Circuit.<sup>2</sup>

**II- Even if this Court has jurisdiction to unseal the docket, it should refrain from doing so since it will substantially prejudice the safety of Felix Sater**

**A. *The legal standard for sealing a docket***

In its March 17<sup>th</sup> Letter, the Government articulates the standard for sealing a docket: “In essence, the Second Circuit’s cases concerning sealing require the Court to balance the public’s qualified First Amendment and common law right to judicial documents against other compelling factors.” *See* March 17<sup>th</sup> Letter, at 5. Here, compelling factors, such as the “safety of [Sater] and his family and law enforcement’s interest in procuring cooperation from other defendants,” far outweigh Richard Roe’s qualified right to access a few docket entries of a 13-year old, dormant case, the contents of which are already publicly accessible. *Id.*

**B. *Sater’s interest in keeping his criminal docket sealed is to protect his and his family’s safety***

The Government has articulated Sater’s strong interest in keeping the docket in this criminal proceeding sealed as follows:

If [Sater’s] cooperation against [organized crime families and international terrorist organizations] was to be revealed in a public and officially- sanctioned manner, there is good reason to believe that the defendant’s safety would be in jeopardy.”

*See* March 17<sup>th</sup> Letter, at 6. The Government even cites to decisions that specifically recognize the danger of the very organizations against whom Sater cooperated. *See, e.g., U.S. v. Mancuso*, 2008 WL 2884397, \*2 (E.D.N.Y. July 23, 2008)(“[t]he Bonanno family’s willingness to interfere with the judicial process, particularly by perpetrating violence against cooperating witnesses is well-documented.”)(emphasis added); *U.S. v. Cirillo*, 2005 WL 2300217, \*2 (2<sup>nd</sup> Cir. Sept. 21, 2005)(“the District Court’s factual finding that the Genovese crime family routinely employs violence to further its interests...was amply supported.”)(emphasis added).

To ensure Felix Sater’s safety from these organizations and from other infamous international terrorist organizations, the Government has strongly urged that “documents essential to preserve the defendant’s safety and the government’s ability to secure cooperation from other individuals” be kept under seal. *See* March 17<sup>th</sup> Letter, at 6.

<sup>2</sup> The Second Circuit also assigned Judge Cogan “with the limited mandate of implementing and overseeing compliance with [its] orders and the orders previously entered into by Judge Glasser.” *See* Ex. 1, Summary Order, at 5:1-4.



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However, in its March 17<sup>th</sup> Letter, the Government mistakenly argues that it can differentiate between docket entries that disclose the fact or details of Sater's cooperation from entries that only disclose Sater's conviction and sentence. This is elevating form over substance. Indeed, unsealing any of the docket entries – especially those proposed by the Government – would be a dead giveaway that Sater cooperated with the U.S. Government – a fact, which if disclosed, the Government has repeatedly stated would place Sater's life in danger.

First, the length of time between Sater's conviction on December 10, 1998 and his sentencing on October 23, 2009, nearly 11 years, would reveal his cooperation. Even a lay person with the most basic knowledge of the federal criminal justice system would know that, based on this time lag, Sater cooperated with the Government. An 11-year time span between conviction and sentencing is extraordinary even for cooperating witnesses. It would be impossible, however, for so much to elapse in the case of a criminal defendant convicted in the ordinary course.

Second, Sater's waiver of indictment and plea to a criminal information would also reveal his cooperation. Under no circumstances would a defendant convicted of racketeering or securities fraud waive indictment and be prosecuted by information unless he were cooperating with the Government. Again, any person with basic knowledge of our justice system would know, without question, that a defendant pleading guilty to an information is a cooperating witness.

Third, the sentence itself would reveal Sater's cooperation. Given that Sater pleaded guilty to racketeering, Sater's sentence of a \$25,000 fine could only mean he cooperated with the Government. Only a cooperating witness who provided substantial and extraordinary assistance to the Government could receive such a light sentence given the crimes charged.

Finally, these entries, when combined with the public news accounts and rumors of Sater's cooperation, would all but confirm that Sater cooperated with the Government and that his cooperation was, in fact, against New York City's and the world's most dangerous criminals.

This was the Government's initial position as well. At oral argument before the Second Circuit on February 14, 2011, the Government stated "that an unsealing of the docket at this time and a public filing and release of the documents... would... pose a substantial probability of prejudice to Sater's safety in this case." *See* Ex. 2, Transcript, at 11:11 – 11:16. Accordingly, the Government advocated "for a sealing that does not release the real name of [Mr. Sater] and does not reveal facts which would alert other individuals to his cooperation or conviction." *Id.*, at 19:5-7 (emphasis added).

Since the Government made these statements, there have been no new developments concerning the safety of Sater or the danger posed to him. The only development is the

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Government's recent discovery of an inadvertent disclosure it made 11 years ago concerning Sater's conviction. Despite 13 years of attempting to keep both Sater's cooperation and his conviction under seal, in a press release, dated March 2, 2000, the Government inadvertently disclosed the identity of Sater in a footnote and the fact that he had been convicted of RICO crimes. As a result, the Government now believes it has no choice but to unseal multiple docket entries of Sater's criminal proceeding, including those which detail his pleading to an information and his sentencing. What the Government fails to realize is that unsealing docket entries that only concern Sater's conviction and sentencing also indirectly reveal his cooperation with the Government.

**C. *Richard Roe has no interest in unsealing the docket since the information he seeks is already publicly available***

In contrast to Sater's compelling interest in maintaining a sealed docket, Richard Roe's interest in unsealing the docket is minimal. Roe does not represent a news organization. He is not trying to vindicate a lofty right with ramifications for the public at large. He is simply a private litigant seeking to expose sensitive information about Sater in order to extract an unmerited settlement in a separate lawsuit. *See* Ex. 2, Transcript, at 29:2-6 (Roe's attorney admits that Roe "came in contact with the facts of this case" in the context of "preparing a RICO complaint."). This is not a paramount interest of the First Amendment.

Indeed, in its oral argument before the Second Circuit, the Government noted that the Supreme Court distinguishes between the First Amendment right of the press and that of an attorney in a civil lawsuit:

The Supreme Court in Gentile v. State [Bar] of Nevada has laid out a clear distinction between attorney speech, especially that in the context of ongoing litigation, meaning not an attorney as a private citizen but as an attorney acting as a hired legal representative and that of the press. It is regulated by an entirely different standard, and the Supreme Court has said that an attorney's First Amendment rights do not give him a blanket opportunity to commit what are clearly unethical acts."<sup>3</sup>

*Id.*, at 19:16-24.

This distinction was not lost on the Second Circuit. Judge Cabranes specifically noted "[w]e are not dealing here with prior restraint of the press or the media." *Id.*, at 30:21-23. Judge Pooler added: "[N]ewspapers have a special charge in publishing information for citizens. Mr. Roe does not have any charge in making this information available to citizens." *Id.*, at 34:6-8. Far from having or wanting to discharge such a duty, Mr. Roe's only motive for wanting to disclose sensitive information about Sater is to extort defendants in a separate action in the

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<sup>3</sup> The cite for Gentile v. State Bar of Nevada, is 501 U.S. 1030, 111 S.Ct. 2720 (1990).

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Southern District of New York (*Kriss et al. v. Bayrock Group LLC et al*, 10 Civ. 3959 )(the “SDNY Action”), including law firms such as Nixon Peabody LLP, Akerman Senterfitt LLP, and their insurance carriers, into paying money to avoid the “embarrassment” of being associated with a convicted RICO felon like Sater.<sup>4</sup>

Furthermore, even if the function of Mr. Roe’s First Amendment right of access was identical to that of a news organization – which it is not – Mr. Roe *already has access to the very information he is seeking*. Indeed, he has ready access to the public news articles and the Government’s inadvertent disclosure in its press release, all of which provide information about Sater and his criminal proceeding. Normally, the public availability of information in a sealed docket is grounds for unsealing the docket. However, this case is different. Here, unsealing the docket would expose information *in addition* to that which is publicly available and information which the Government deems unsafe. It would expose Sater’s cooperation with the Government, a revelation the Government itself admits would pose substantial and unnecessary prejudice to Sater’s safety.

Finally, in assessing Roe’s interest, we also ask the Court to consider the context in which all this litigation arose. As this Court is aware, Roe obtained stolen documents, which he knew to be privileged, sealed, and confidential, unlawfully filed those documents publicly in the SDNY action, and blatantly disregard this Court’s orders to return some of the documents.<sup>5</sup> So brazen has been Roe’s conduct that the Second Circuit has seen fit to appoint a separate judge for the sole purpose of policing the enforcement of its orders and the orders of this Court.

### **III- If the Court decides to unseal the docket, it should consider alternatives to disclosing Sater’s identity and revealing his conviction or sentence**

Nevertheless, if the Court finds that the public should have access to some of the docket entries the Government proposes in its March 17<sup>th</sup> Letter, then we would like the opportunity to propose some alternative solutions. One solution could be to unseal only docket entries which do not, even indirectly, reveal Sater’s cooperation. A second solution would be to unseal the entire docket without revealing Sater’s identity, with all entries only referring to “John Doe.” This would address Roe’s concern “as a citizen” that the judiciary is not maintaining a “secret docket” and operating under a shroud of secrecy, while simultaneously maintaining the safety of Sater and his family.

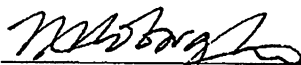
<sup>4</sup> Mr. Roe has specifically told several defendants’ counsel in that case that Sater should just “get out of the way,” so he can go after the law firms and their insurance carriers because “that’s where the money is.”

<sup>5</sup> Roe has also disregarded and violated numerous orders of the Second Circuit and the Southern District. For the sake of brevity, we will not catalogue all these violations for the Court.

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At the very least, we would like to have a hearing to explore these options before unsealing a docket that the Government has found necessary to keep sealed for 13 years.

Respectfully Submitted,

By:   
Nader Mobargha  
*Counsel for Felix Sater*

Cc: Judge Brian M. Cogan

Counsel for Richard Roe, Esq.  
Richard Lerner, Esq.

The United States Attorney's Office  
Todd Kaminsky  
Elizabeth J. Kramer

ADDITIONAL INFORMATION  
FOR THE RECORD  
6

VIA AIR MAIL

Case 1:98-cr-01101-ILG Document 19 \*SEALED\* Filed 03/23/11 Page 10 of 58 PageID #: 2091

10-2905-cr, 11-479-cr  
USA v. DoeUNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

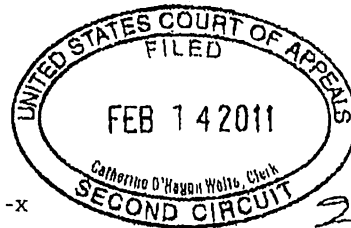
## SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14<sup>th</sup> day of February two thousand and eleven.

PRESENT:

JOSÉ A. CABRANES,  
ROSEMARY S. POOLER  
DENNY CHIN,

*Circuit Judges.*

RICHARD ROE,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee,*

JOHN DOE,

*Defendant-Appellee.*

Nos. 10-2905-cr, 11-479-cr

FOR RICHARD ROE:

RICHARD E. LERNER, Wilson, Elser, Moskowitz,  
Edelman & Dicker LLP, New York, NY..

FOR APPELLEE:

TODD KAMINSKY, Assistant United States Attorney,  
United States Attorney's Office for the Eastern District  
of New York, Brooklyn, NY.

1

MANDATE ISSUED ON 02/14/2011



1 FOR DEFENDANT-APPELLEE: KELLY ANNE MOORE, Morgan, Lewis & Bockius LLP,  
2 New York, NY.  
3  
4  
5

6 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND  
7 DECREED, following a hearing on the record on February 14, 2011, that an injunction *pendente lite*  
8 shall enter to prevent the dissemination by any party, their officers, servants, employees and attorneys,  
9 and all who are in active concert or participation with them, of materials placed under seal by orders of  
10 this Court or of the United States District Court for the Eastern District of New York (I. Leo Glasser,  
11 Judge).

12 Richard Roe ("Roe") is an attorney at law whose identity is known to all participants in this  
13 litigation and who has been given the name "Richard Roe" as a legal placeholder because the disclosure  
14 of his true identity in this litigation context may, for the time being, lead to the improper disclosure of  
15 the materials at issue here.

16 Roe appeals from orders of the District Court permanently enjoining distribution of a  
17 Presentence Investigation Report ("PSR") prepared for sentencing purposes in a criminal proceeding  
18 before Judge Glasser and temporarily enjoining Roe and his clients from further disseminating other  
19 sealed documents filed in Doe's criminal proceedings before the District Court (Docket No. 10-2905-  
20 cr).

21 We also have before us a separately docketed but consolidated petition for a writ of mandamus  
22 directing the District Court to make public the docket of the criminal case in question (Docket No. 11-  
23 479-cr). In turn, the United States (the "government") seeks a temporary injunction, pending the  
24 disposition of this appeal, to restrain Roe and his counsel and clients, and all persons acting in concert  
25 with them, from the threatened dissemination of the sealed materials at issue here by (1) filing and  
26 pursuing civil actions in other federal or state courts in which the sealed materials are annexed to  
27 pleadings or otherwise referred to or made public, and (2) by conveying copies of these materials or the  
28 contents thereof to third-parties, including the media.

29 We assume the parties' familiarity with the remaining facts and procedural history of the case.  
30

(i)

We turn first to Roe's petition for a writ of mandamus. The All Writs Act empowers us to "issue all writs necessary or appropriate in aid of [our] respective jurisdiction[ ] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). One such writ is the writ of mandamus, an "extraordinary remedy" that has been used "both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (brackets and internal quotation marks omitted). We issue a writ of mandamus only in "exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion.'" *Id.* (citations and some internal quotation marks omitted); *see also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir.2008) ("A district court has abused its discretion if it [has] based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or [has] rendered a decision that cannot be located within the range of permissible decisions." (brackets, citations, and internal quotation marks omitted)).

Roe falls well short of his heavy burden to secure a writ of mandamus directed to the District Court. Here, the District Court reviewed the sealed documents and the voluminous submissions by the parties, conducted four days of hearings inquiring into how Roe had obtained the documents and how he intended to use them, and explained in detail and on the record its well-reasoned decision to issue a permanent injunction against further distribution of the PSR and a temporary injunction against further distribution of the other sealed documents. Under the circumstances, we see no basis upon which to conclude that the District Court in any way usurped its power or clearly abused its discretion. *See Cheney*, 542 U.S. at 380. Accordingly, the petition for a writ of mandamus (Docket No. 11-479-cr) is DENIED.

Our decision to deny the petition for a writ of mandamus may be further elaborated in due course in a published opinion.

The docket in this proceedings (Docket No. 11-479-cr) and all documents referenced therein shall remain SEALED until further order of this Court.

(ii)

Pending a full review of the merits of Roe's appeal by a panel of this Court, the government, by a sealed motion of January 26, 2010 and accompanying affidavit, requests a temporary stay of the unsealing of Docket No. 10-2905-cr and of the materials placed under seal by Judge Glasser pending the appeal of this matter. In light of the serious, indeed grave, concerns expressed by the United States regarding the possible consequences of unsealing these documents, and the absence of any sufficiently persuasive countervailing considerations expressed by Roe, the government's motion is hereby GRANTED.

Accordingly, pursuant to this order and to our orders of January 28, 2011 (granting government's motion for an emergency stay of unsealing the docket in No. 10-2905); February 9, 2011 (granting government's motion for an emergency stay of unsealing the docket in No. 11-479 and ordering Roe not to publicly file any additional documents or cases that referred to matters subject to sealing orders in Nos. 10-2905-cr and 11-479-cr); February 10, 2011 (re-emphasizing, *inter alia*, that Roe was not to reveal or distribute sealed documents, nor contents thereof, to any third-parties, including members of the public or the media); and February 11, 2011 (re-emphasizing, *inter alia*, that all previous orders of this Court and of the United States District Court for the Eastern District of New York with respect to the documents at issue remained in full force and effect until further order of this Court), we hereby ORDER that ALL PARTIES, THEIR OFFICERS, AGENTS, SERVANTS, EMPLOYEES, AND ATTORNEYS, AND ALL OTHER PERSONS WHO ARE IN ACTIVE CONCERT OR PARTICIPATION WITH THEM, *see* Fed. R. Civ. P. 65(d)(2), are TEMPORARILY—and WITHOUT PREJUDICE to any claims or arguments that may be asserted by the parties on the merits of these appeals or on the orders in effect during the consideration of the appeals—ENJOINED from publicly distributing or revealing in any way, to any person, or in any court, proceeding or forum, except to those persons directly involved in the parties' own legal representation, any documents or contents thereof subject to sealing orders in Docket No. 10-2905-cr or in any related proceedings before the District Courts for the Eastern District of New York and Southern District of New York.

For the purpose of enforcing this Court's orders and those of the District Court for the Eastern District of New York during the panel's consideration and adjudication of the pending appeal, we

1 REMAND the cause (Docket No. 10-2905-cr) to the District Court for the Eastern District of New  
2 York with instructions to the Chief Judge of that Court to assign a United States District Judge from  
3 that Court with the limited mandate of implementing and overseeing compliance with our orders and  
4 the orders previously entered by Judge Glasser. Of course, Judge Glasser, an experienced and able jurist  
5 who has shown admirable patience and forbearance in the face of extraordinary provocations, shall  
6 retain jurisdiction over the underlying (and long-lived) criminal proceeding involving John Doe.

7 Furthermore, in all other respects and pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir.  
8 1994), this panel shall retain jurisdiction over (1) the pending appeal, both for the disposition of the  
9 appeal on the merits as well as with respect to any further motions practice; (2) any other appeals from  
10 the District Court's order granting the permanent and temporary injunctions at issue; and (3) any  
11 appeals arising from any further proceedings in the District Court, including any further petitions for  
12 extraordinary writs, including the writ of mandamus.

13  
14 (iii)

15 Without in any way limiting the effect of this summary order and the Court's previous orders,  
16 we further ORDER:

17 (1) This appeal (Docket No. 10-2905-cr) will be EXPEDITED.

18 (2) The briefing schedule will be as follows:

19 a. Roe's opening brief shall be filed no later than Monday, February 28, 2011.

20 b. The government's opening brief shall be filed no later than Monday, March  
21 14, 2011.

22 c. Roe's reply brief shall be filed no later than Monday, March 21, 2011.

23 d. The government's sur-reply brief shall be filed no later than Thursday, March  
24 24, 2011.

CONCLUSION

To summarize:

- (1) the petition for a writ of mandamus in Docket No. 11-479 is DENIED, and the docket of that case shall remain SEALED pending further order of our Court;
  - (2) the government's motion for a temporary stay of unsealing of the docket in No. 10-2905-cr pending full review of the merits of Roe's appeal is GRANTED;
  - (3) the parties and all who are in active concert or participation with them are TEMPORARILY ENJOINED, pursuant to the terms of the order stated above;
  - (4) we REMAND the cause to the United States District Court for the Eastern District of New York for a limited purpose and under the terms noted above.
- The limited mandate described above shall issue forthwith.


FOR THE COURT,

Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 Catherine O'Hagan Wolfe





UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

New York, N.Y.

v.

10-2095-cr

JOHN DOE.

Respondent.

February 14, 2011  
1:30 p.m.

Before:

HON. JOSE A. CABRANES, Presiding  
HON. ROSEMARY S. POOLER  
HON. DENNY CHIN

Circuit Judges

APPEARANCES

TODD KAMINSKY  
PETER A. NORLING  
MARSHALL MILLER  
ELIZABETH KRAMER  
Attorneys for Petitioner

RICHARD E. LERNER  
Attorney for Respondent

KELLY ANN MOORE  
Attorney for John Doe

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

New York, N.Y.

v.

10-2095-cr

JOHN DOE.

Respondent.

February 14, 2011  
1:30 p.m.

Before:

HON. JOSE A. CABRANES, Presiding  
HON. ROSEMARY S. POOLER  
HON. DENNY CHIN

Circuit Judges

APPEARANCES

TODD KAMINSKY  
PETER A. NORLING  
MARSHALL MILLER  
ELIZABETH KRAMER  
Attorneys for Petitioner

RICHARD E. LERNER  
Attorney for Respondent

KELLY ANN MOORE  
Attorney for John Doe

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SEALED

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APPEARANCES (Continued)

3

ALSO PRESENT:

4

RICHARD ROE

5

JUDY SELMECI

6

DAVID SNYDER

7

NADER MOBARGHA

8

MICHAEL BEYS

9

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SEALED

1 JUDGE CABRANES: Good afternoon. This is United  
2 States of America v. John Doe. It has many captions. I will  
3 call the role of roll of counsel and the parties in two appeals  
4 that have been consolidated for purposes of argument and that  
5 at least for now bear the following captions: Richard Roe v.  
6 USA and John Doe, Docket No. 10-2905, and Richard Roe,  
7 Petitioner v. USA, Respondent and John Doe 1, John Doe 2,  
8 Defendants, Docket No. 11-479. I ask each of the persons whose  
9 names I call out to simply answer my confirming his or her  
10 presence.

11 This is not the time for anything more than the word  
12 "present" and an indication of whether you are admitted to the  
13 bar of this court. You will each have time to express your  
14 views after this roll call and after I make a brief  
15 introductory statement.

16 Richard Roe, also known as Frederick Oberlander.

17 MR. ROE: Present, and I am not admitted in this  
18 court.

19 JUDGE CABRANES: We usually stand.

20 MR. ROE: I'm sorry.

21 JUDGE CABRANES: Are you admitted to any federal  
22 court?

23 MR. ROE: Southern District.

24 JUDGE CABRANES: Counsel for Richard Roe is Richard  
25 Lerner.

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1 MR. LERNER: Yes. I am present and admitted to  
2 practice before this court.

3 JUDGE CABRANES: Thomas W. Hyland.

4 MR. LERNER: He was unable to make it here today.

5 JUDGE CABRANES: Unable to make it today. Judy  
6 Selmecici.

7 MS. SELMECI: I am admitted to practice in this Court.

8 JUDGE CABRANES: You are admitted to the bar of this  
9 court. Thank you.

10 Counsel for the United States, Todd Kaminsky.

11 MR. KAMINSKY: Present, your Honor, and admitted.

12 JUDGE CABRANES: Elizabeth Kramer.

13 MS. KRAMER: Present, your Honor, and admitted.

14 JUDGE CABRANES: Marshall Miller.

15 MR. MILLER: Present your Honor add admitted.

16 JUDGE CABRANES: Peter Norling.

17 MR. NORLING: Present and admitted.

18 JUDGE CABRANES: Counsel for John Doe, Kelly Anne  
19 Moore of Morgan Lewis & Bockius.

20 MS. MOORE: Present and admitted your Honor.

21 THE COURT: David Snyder of Morgan Lewis & Bockius?

22 MR. SNYDER: Present, your Honor, and not admitted.

23 JUDGE CABRANES: Are you admitted to any federal bar?

24 MR. SNYDER: No, your Honor.

25 JUDGE CABRANES: You are admitted to what bar?

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1 MR. SNYDER: State of New York.

2 JUDGE CABRANES: Nader Mobargha of Beys Stein &  
3 Mobargha.

4 MR. MOBARGHA: Present and not admitted to this Court.

5 JUDGE CABRANES: To what court are you admitted?

6 MR. MOBARGHA: The Southern and Eastern Districts of  
7 New York.

8 JUDGE CABRANES: And the State of New York?

9 MR. MOBARGHA: Yes.

10 JUDGE CABRANES: Is there anyone else whose name I  
11 have not called?

12 MR. BEYS: Yes, your Honor. Michael Beys of Beys,  
13 Stein & Mobargha for defendant-appellee Doe, present and  
14 admitted.

15 JUDGE CABRANES: Thank you.

16 We are here for oral argument in two related matters.  
17 As I indicated, they bear captions that at least temporarily  
18 employ the coined names of "John Doe" and "Richard Roe" -- the  
19 cases that, as I noted, are docketed in the Court of Appeals as  
20 No. 10-2905-cr. and No. 11-479-cr. Both arrived from  
21 long-lived proceedings in the United States District Court for  
22 the Eastern District of New York before Judge I. Leo Glasser.  
23 The record will reflect that, pursuant to an order of the  
24 Court, we are here in a closed courtroom. The proceedings here  
25 are being recorded by an official court reporter as well as by



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1 electronic means. The record in these cases shall remain under  
2 seal until further order of the Court.

3       These matters came before this Court on an expedited  
4 and emergency basis. In documents placed before us, the  
5 government and the district court asserted serious concerns  
6 about the public dissemination of certain documents, in and out  
7 of state and federal court proceedings. These disclosures  
8 allegedly are in violation of court orders and allegedly could  
9 risk life-threatening injury to identifiable persons, including  
10 the person identified in our cases as John Doe.

11       As a result of the way in which these emergency  
12 matters were presented to the Court, and in order to try to  
13 maintain the status quo in volatile and confused circumstances  
14 until this expedited hearing could be held, this Court has  
15 entered a series of temporary sealing orders and/or injunctive  
16 orders.

17       Because these orders were entered in response to  
18 fast-breaking developments, the captions and references to  
19 petitioner and respondent are sometimes the victim of  
20 typographical errors. The captions will be adjusted in the  
21 course of this hearing or immediately thereafter. Suffice it  
22 to say for now that, regardless of any obvious typographical  
23 errors in the orders, we are all well aware that the sealing  
24 orders and temporary injunctions of the Court of Appeals have  
25 all been aimed at Richard Roe, an attorney at law, and at his

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1 attorneys. It is not John Doe or the government who have  
2 sought to disseminate any of the material at issue here. The  
3 only parties who have indicated on the record an intention to  
4 disseminate the documents at issue here are Richard Roe and his  
5 attorneys. That much the court knows and that much all of you  
6 here know.

7 Accordingly, to avoid caption issues that may cause  
8 confusion on the record, let us speak today of Richard Roe and  
9 John Doe, not of petitioner or respondent, nor of appellant and  
10 appellees. It is clear from the record, of course, that it is  
11 Richard Roe and his lawyers who vigorously and openly wish to  
12 disseminate these materials, and thus it is the government and  
13 John Doe who wish to prevent Roe and his lawyers from doing so.

14 The first Court of Appeals order of consequence was an  
15 order of Judge Livingston sealing the record of this case and  
16 referring the emergency motions of the government to a  
17 regularly-convened motions panel.

18 We are that panel.

19 After this matter was referred to this motions panel,  
20 the Court entered a number of orders that re-affirmed the  
21 sealing order of Judge Livingston and otherwise sought to  
22 maintain the status quo until this hearing could be held.

23 We have taken precautions to assure that all counsel  
24 of record and the party known as Richard Roe receive timely  
25 notice of these orders promptly upon entry of the order by

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1 e-mail and/or fax and/or phone calls from the clerk's office.  
2 Unless informed otherwise, we will assume that notice of these  
3 several orders was effected.

4 You may wish to take notes of the Court orders to  
5 which I refer. In order to assist you in this regard, the  
6 Court asked the Deputy Clerk of Court to provide each of you  
7 with copies of these orders before we convened here. I am  
8 informed that sets of these copies were provided to all counsel  
9 of record and that each of you has copies of these orders  
10 before you at this time.

11 They include:

12 (1) An order of February 8, 2011 granting the  
13 government's motion to temporarily seal the docket here and  
14 seeking to prevent any public dissemination of matters subject  
15 to existing sealing orders;

16 (2) An order of February 9, 2011 denying a motion to,  
17 among other things, vacate the court's earlier so-called sua  
18 sponte order closing the courtroom for today's hearing;

19 (3) An order of February 10, 2011 that, among other  
20 things, consolidated these two docketed appeals until further  
21 order of the Court. It also responded to reports or apparent  
22 threats by Richard Roe and/or his counsel to disseminate sealed  
23 materials at issue here in other court proceedings or public  
24 forums. The Court responded to these reports or apparent  
25 threats in the order of February 10 by, among other things,

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1 temporarily enjoining "all parties . . . from disseminating or  
2 distributing in any manner and in any court, proceeding, or  
3 forum any documents filed in th[ese appeals] or in related  
4 proceedings in the Eastern and Southern Districts of New York  
5 or the contents thereof, to any member of the public or media  
6 except to those persons directly involved in the parties' legal  
7 representation, who shall be bound by this order of  
8 confidentiality and sealing."

9 The February 10, 2011 order also affirmatively  
10 enjoined Richard Roe, who is a member of the bar, to submit in  
11 writing by 5 p.m. on Friday, February 11, "a list of any public  
12 or media persons . . . to whom he or his counsel have revealed  
13 or distributed in any manner the filings in these proceedings  
14 or the contents thereof."

15 This February 10 order also affirmatively enjoined  
16 Richard Roe to identify with specificity the documents or  
17 contents that were revealed or distributed to each such person.  
18 This, too, was to have been done by Friday, February 11 at 5:00  
19 p.m.

20 I understand that we have a letter that was indeed  
21 filed on Friday but that has come to our attention only this  
22 morning and which apparently was not conveyed to opposing  
23 counsel. We will deal with that matter in a moment.

24 I think we all know what "under seal" means -- but  
25 perhaps not, so I wish to make it clear that for the time being

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1 and until this Court is able to sort out the claims of a breach  
2 of court sealing orders, these proceedings are confidential and  
3 the record is subject to a sealing order of this Court, the  
4 violation of which will subject any violator of our sealing  
5 orders to punishment for civil and/or criminal contempt of  
6 court.

7 It should likewise be clear that the parties hereto  
8 are always free to seek review of our orders from the Supreme  
9 Court of the United States. That said, while our sealing  
10 orders remain in effect, as they may be supplemented by  
11 additional orders today or in the near future, any and all  
12 papers filed in the Supreme Court referring to matters or  
13 documents subject to extant sealing orders shall be filed in  
14 the Supreme Court under seal.

15 I have also been informed today that there is a copy  
16 of a purported petition for certiorari that was filed or was to  
17 be filed in the Supreme Court. Apparently, it was not filed  
18 under seal. We will expect that counsel of record will take  
19 all the necessary precautions to seek to place that material  
20 under seal until further order of this Court or of the Supreme  
21 Court.

22 These preliminary matters having been completed, I  
23 will ask the representative of the U.S. Attorney's Office for  
24 the Eastern District of New York to come forward and provide a  
25 general status report on the proceedings to date and to provide

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1 a brief statement of what relief, if any, the government seeks  
2 today.

3 We will then hear from counsel for Richard Roe, from  
4 whom we likewise will seek a statement of the relief he seeks  
5 from this Court.

6 MR. KAMINSKY: Good afternoon. May it please the  
7 Court, I'm Todd Kaminsky. And I represent the appellee, the  
8 United States. And the government is here today to argue for a  
9 continued sealing of the appellate docket and now what is the  
10 consolidated dockets before this court.

11 The government, as laid out in its brief, believes  
12 that an unsealing of the docket at this time and a public  
13 filing and release of the documents that opposing counsel would  
14 like to, and Roe and his attorney would like to release at this  
15 time pose a substantial probability of prejudice to Doe's  
16 safety in this case.

17 JUDGE CABRANES: Could you tell us whether at the  
18 moment all the documents in Doe's criminal proceeding and in  
19 the Southern District of New York civil matter, are they all  
20 now under seal as far as you know?

21 MR. KAMINSKY: The Southern District, your Honor, they  
22 are not all under seal. Although I am not a party to that  
23 civil proceeding, I've gone on to the electronic PACER system  
24 and several documents can be accessed. The main document at  
25 issue in that case, the complaint filed by Mr. Roe that



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1 contains all of the damaging information about Mr. Doe, that  
2 cannot be accessed publicly at this time.

3 The Eastern District docket, currently being presided  
4 over by the Honorable Judge Glasser, is completely under seal.  
5 There are no accessible documents at this time.

6 JUDGE CABRANES: Can you describe in general terms why  
7 these documents are so sensitive, particularly since some of  
8 them seem to be somewhat antique, and there have been in the  
9 past some news accounts of the activities or purported  
10 activities of John Doe?

11 MR. KAMINSKY: Yes, your Honor.

12 Mr. Doe's cooperation was of an extraordinary depth  
13 and breadth, almost unseen, at least in this United States  
14 Attorney's Office.

15 He cooperated, unlike some cooperators who cooperate  
16 within one type of organized crime family or over one type of  
17 crime, Mr. Doe's cooperation runs a gamut that is seldom seen.  
18 It involves violent organizations such as Al Qaeda, it involves  
19 foreign governments, it involves Russian organized crime. And,  
20 most particularly, it involves various families of La Cosa  
21 Nostra. By that specifically I mean an individual on the  
22 ruling board of the Genovese crime family, a captain in the  
23 Bonanno crime family, a soldier in the Gambino crime family,  
24 the list goes on and on.

25 The reason why I bring that up, your Honor, is that

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1 all of the documents that are currently within the 1998 docket  
2 in front of Judge Glasser mention Mr. Doe's name or refer to  
3 his cooperation.

4 Now, at the time of the sealing in 1998 and through  
5 the beginning of 2008, Mr. Doe worked in a proactive capacity  
6 actively aiding grand jury investigations that involved  
7 surreptitious recordings of individuals as well as other  
8 undercover actions.

9 JUDGE POOLER: Counsel, are you satisfied that he's  
10 told the truth in all cases?

11 MR. KAMINSKY: Your Honor, from the record that I have  
12 seen, and it was my job for his sentencing to review all of his  
13 statements to the FBI, I was not the individual that worked  
14 with him, but I have no information that he has been untruthful  
15 for any purpose or to any extent.

16 JUDGE POOLER: You are relying on his information in  
17 other cases?

18 MR. KAMINSKY: Yes.

19 There are no current prosecutions that involve the  
20 necessary testimony or information from Doe at this time. But  
21 there got to be a situation where ten years of constant  
22 undercover work and arrests and indictments as well as  
23 convictions, some very extensive, made as a result of his  
24 actions got to a point where it became too dangerous to allow a  
25 confirmation of his cooperation to be known.

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1           There have been public accounts. They have been  
2           extensive in terms of their allegations, but they have been  
3           lacking in terms of their corroboration and the government seal  
4           of approval, if you will. The government feels that is an  
5           important difference.

6           JUDGE CABRANES: At this particular proceeding I take  
7           it that the government is seeking a temporary injunction, that  
8           is, for the time being, during the pendency of the appeal,  
9           which presumably would sort out all of these issues.

10          MR. KAMINSKY: That's correct. The government  
11          certainly envisions a time when part of this docket will be  
12          unsealed, and I note to the Court that the actual filing  
13          occurred in May, meaning the Southern District complaint that  
14          started this whole incident. But only on February 3 and 4 did  
15          Mr. Roe or counsel for Mr. Roe finally make a motion, it was  
16          actually a demand below to unseal the docket. And I do not  
17          know what procedures the district court intends to employ. As  
18          U.S. v. Doe from 1995 states, there are numerous ways for a  
19          district court to go about determining --

20          JUDGE CABRANES: How many cases are there, as far as  
21          you know, in the Southern District of New York that are  
22          arguably related to these matters?

23          MR. KAMINSKY: Only one, your Honor.

24          JUDGE CABRANES: Only one?

25          MR. KAMINSKY: Yes.

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1 JUDGE CABRANES: This is the one before Judge  
2 Buchwald?

3 MR. KAMINSKY: Correct.

4 JUDGE CHIN: Judge Buchwald never sealed that case,  
5 right? She just sealed the complaint as opposed to the entire  
6 case?

7 MR. KAMINSKY: That's correct. Your Honor, I stand  
8 corrected. I have not been involved in the civil matters. I  
9 turned to Mr. Doe's counsel. I have been informed the answer  
10 is three, three related matters.

11 JUDGE POOLER: Counsel, I read an article in the New  
12 York Times that seems to have vital information about John Doe.  
13 How can you keep it secret when it's been in the New York  
14 Times?

15 MR. KAMINSKY: Your Honor, there are a number of  
16 things, a number of responses to that.

17 JUDGE POOLER: That was submitted to me I didn't go  
18 searching for it. It was submitted with one filing. I guess  
19 must be from Richard Roe.

20 MR. KAMINSKY: The government alerted the Court to  
21 that.

22 JUDGE POOLER: OK.

23 MR. KAMINSKY: In that filing, your Honor, there were  
24 three individuals who pleaded guilty together as part of the  
25 underlying crime who became cooperators together and then who

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1 worked for the government. One of those cooperators became  
2 disgruntled, spoke to the New York Times and said, I was there  
3 I saw it happen. But the Times itself couldn't find any  
4 confirmation of that.

5 It may be that during a future determination of how  
6 much could be unsealed that article will play a role. But the  
7 government feels that opposing counsel's actions in this case  
8 of unilaterally deciding to out the cooperator within the  
9 context of a current litigation is just not an acceptable way  
10 of doing that.

11 However, your Honor, the government also feels that it  
12 is a world of difference between the Times speculating about  
13 something and it being enough of a government stamp of approval  
14 to warrant retaliatory action against somebody. The government  
15 feels at this time that the threats are still extensive enough  
16 that even with that article it would be extremely dangerous to  
17 have Mr. Doe's cooperation revealed.

18 JUDGE CABRANES: To the extent that we may be  
19 restraining dissemination of these materials to the press or to  
20 other media, I have a number of questions for you. These  
21 questions will be a little specific. They might seem a bit  
22 redundant, but I want to make sure that we have everything set  
23 forth very clearly on this record.

24 And now I'm turning to the famous question of prior  
25 restraint. One way of evaluating a prior restraint is to

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1 examine the gravity of the evil discounted by the impossibility  
2 that it will occur.

3 What exactly is the danger you fear here if the  
4 information in these documents becomes public?

5 MR. KAMINSKY: Your Honor, it's twofold: I'll start  
6 with the, if you will, less grave one first.

7 As this Court stated in Amedeo II, the knowledge that  
8 someone who is a cooperator and has gone to the extent that  
9 Mr. Doe has will be an outed individual who will have to live  
10 his or her life in fear I think is something that will dissuade  
11 such cooperation in the future. As that Court said, if such  
12 informants in the present or future cases anticipate that their  
13 cooperation will likely become a matter of public knowledge,  
14 valuable cooperation might cease.

15 Second of all, I think it's a very real harm that  
16 could come to Mr. Doe himself. The very families that Mr. Doe  
17 cooperated against have killed witnesses in the past. That's  
18 been recorded. And his cooperation --

19 JUDGE CABRANES: You are speaking of organized crime  
20 families?

21 MR. KAMINSKY: That's correct. And his cooperation  
22 was not just the type of cooperation not to be noticed. It  
23 shut down an enterprise that shut off the valve to tens of  
24 millions of dollars.

25 JUDGE POOLER: Do they know who the cooperator is?

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1 MR. KAMINSKY: Your Honor, there are a number of  
2 different individuals whom they may suspect. But Mr. Doe was,  
3 depending how one looks at it, fortunate to not have to testify  
4 over his 11-year career as a cooperator and none of the  
5 individuals in organized crime had ever received any, as far as  
6 the government knows, any official acknowledgement of that  
7 cooperation.

8 JUDGE POOLER: Has he been sentenced for his  
9 conviction?

10 MR. KAMINSKY: Yes.

11 JUDGE CABRANES: So I take it that in your experience  
12 you are telling us that the danger here can be characterized as  
13 great and certain?

14 MR. KAMINSKY: Your Honor, the government certainly  
15 affirms the word "great." "Certain" is something the  
16 government is a little bit less comfortable with. I'm  
17 comfortable with the words in Doe of a substantial probability.  
18 I believe that probability is substantial.

19 JUDGE CABRANES: So, if I understand you correctly,  
20 you're saying that the critical government interest here is  
21 protecting the life of the cooperating witness, among other  
22 things?

23 MR. KAMINSKY: Yes, your Honor.

24 JUDGE CABRANES: Are there any less intrusive measures  
25 other than sealing that would be adequate to prevent the danger

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1 we are talking about?

2 MR. KAMINSKY: The government thinks not, your Honor.

3 The extent of what sealing would be left on this  
4 record is still something that is to be worked out. But the  
5 government advocates for a sealing that does not release the  
6 real name of Mr. Doe and does not reveal facts that would alert  
7 other individuals to his cooperation or conviction.

8 JUDGE CABRANES: Is it the case that various orders  
9 entered by the district court and the Court of Appeals involve  
10 no prior restraints on the press or media?

11 MR. KAMINSKY: That's correct.

12 JUDGE CABRANES: That is, we are not talking about  
13 preventing a news organization from publishing a matter of  
14 public concern or impinging on editorial discretion.

15 MR. KAMINSKY: No, your Honor, and the government  
16 feels that's particularly salient in this case. The Supreme  
17 Court in Gentile v. State of Nevada has laid out a clear  
18 distinction between attorney speech, especially that in the  
19 context of ongoing litigation, meaning not an attorney as a  
20 private citizen but as an attorney acting as a hired legal  
21 representative and that of the press. It is regulated by an  
22 entirely different standard, and the Supreme Court has said  
23 that an attorney's First Amendment rights do not give him a  
24 blanket opportunity to commit what are clearly unethical acts.

25 JUDGE POOLER: Indeed, as we discussed a moment ago,



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1 this has been published information about this case has been  
2 published.

3 MR. KAMINSKY: That's correct, your Honor.

4 JUDGE CABRANES: Let me understand something about the  
5 proceedings before Judge Glasser.

6 Do I understand correctly that Judge Glasser only  
7 issued a permanent injunction with respect to the presentence  
8 report?

9 MR. KAMINSKY: Correct.

10 JUDGE CABRANES: And the cooperation agreement, the  
11 proffer agreement, and the sealed indictment, what's their  
12 status, and do they remain in the possession of Richard Roe?

13 MR. KAMINSKY: They remain in the possession of  
14 Richard Roe. I believe the copies of these documents remain in  
15 the possession of Mr. Roe and other individuals to whom he  
16 originally sent them when he filed the complaint.

17 But Judge Glasser has currently not reviewed them, has  
18 not resolved that issue. It was clear to Judge Glasser that  
19 the PSR, according to Charmer was a clear issue of law where  
20 the document had to be returned by Mr. Roe, but he asked for  
21 briefing on what powers he had to ask for documents to be  
22 returned that were taken.

23 The issue there was, your Honor, who did the original  
24 sealing order apply to, and if Mr. Roe was not a party to that  
25 original proceeding did Judge Glasser have the authority to

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1     enjoin him. The government has written on that matter and has  
2     briefed the issue that, according to the all writs act, Judge  
3     Glasser does have such power.

4             JUDGE CABRANES: And that matter is still before Judge  
5     Glasser?

6             MR. KAMINSKY: That's correct.

7             I would just like to remind the Court that there was I  
8     standstill agreement between Roe and Doe for about four months  
9     where nothing happened at all, and then in the fall the  
10    litigation resumed again. And that's when the government filed  
11    a letter in furtherance of another injunction.

12            JUDGE POOLER: Does the government have a theory as to  
13    how Roe got ahold of these documents?

14            MR. KAMINSKY: We do, your Honor. Judge Glasser held  
15    a day of hearings where he called Roe to testify, and Mr. Roe  
16    stated that it was a client of his --

17            JUDGE POOLER: Not John Doe?

18            MR. KAMINSKY: No. A client of his had given them to  
19    him. Mr. Doe testified that he kept them in his office, and  
20    Judge Glasser came to the conclusion at the end of the hearings  
21    that a client of Mr. Roe had stolen them from Mr. Doe, from his  
22    office, and had provided them to Mr. Roe. Judge Glasser said  
23    on the record that it was clear that they were taken under  
24    less-than-legal circumstances.

25            JUDGE POOLER: And Mr. Roe still has them? Attorney

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1 Roe still has them.

2 MR. KAMINSKY: Yes, and copies.

3 JUDGE POOLER: And copies of them?

4 MR. KAMINSKY: Yes.

5 JUDGE POOLER: Have you asked for them back?

6 MR. KAMINSKY: I don't know if we specifically have  
7 spoken on a one-to-one basis with them, but we have certainly  
8 made clear our position that they are not entitled to them.

9 JUDGE POOLER: You have never requested them to be  
10 turned in to the U.S. Attorney's Office.

11 MR. KAMINSKY: Your Honor, Judge Glasser directed  
12 Mr. Roe to return the PSR to the U.S. Attorney's Office, and  
13 we've never received his copy, so we did not.

14 JUDGE CABRANES: Did that happen as far as you know?

15 MR. KAMINSKY: No, we haven't been given anything.

16 JUDGE CABRANES: You don't know of any reason to  
17 believe that the presentence report was returned.

18 MR. KAMINSKY: At this time the government is positive  
19 that Mr. Roe has copies of the PSR that he says that he is  
20 under no obligation to return to anyone.

21 JUDGE CABRANES: But there is an order directing him  
22 to return his copies of the PSR?

23 MR. KAMINSKY: Yes, and he appealed that.

24 JUDGE CABRANES: But we don't know whether he has  
25 obeyed that order.

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1 MR. KAMINSKY: He has clearly not obeyed that order,  
2 your Honor.

3 JUDGE CABRANES: I see. Are you aware whether any  
4 authorities in the federal or state governments are  
5 investigating or considering criminal prosecution of the people  
6 who apparently stole these documents in the first place?

7 MR. KAMINSKY: I have. I recently been in contact or  
8 received a call from assistant district attorneys in Manhattan  
9 where Mr. Doe's office was. I guess that would be the  
10 jurisdiction for the theft. But I am not involved in that and  
11 don't know how far it's gone.

12 JUDGE CABRANES: Thank you.

13 Let's hear from -- unless my colleagues have any other  
14 questions?

15 JUDGE POOLER: No.

16 JUDGE CABRANES: We'll turn to counsel for Roe.

17 MR. KAMINSKY: Thank you, your Honor.

18 MR. LERNER: Good afternoon, your Honors. I would  
19 first like to correct the record. The PSR which Mr. Roe  
20 received directly from the former client at the company, who I  
21 shall not name, that was handed up to the Court as an exhibit  
22 during the proceedings. That original is in the Court's  
23 possession.

24 There was further briefing --

25 JUDGE CABRANES: In possession of Judge Glasser?

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1 MR. LERNER: Yes.

2 JUDGE CABRANES: Do you or your client continue to  
3 have copies of the presentence report?

4 MR. LERNER: Yes, electronic copies.

5 Now, there's affidavits -- I don't know whether your  
6 Honors have seen the affidavit from the company's general  
7 counsel. He states that when he received the complaint in the  
8 Southern District action from Mr. Roe, and this was before  
9 there was any injunctive relief or a sealing order issued, that  
10 attorney, Mr. Schwartz, disseminated it to many people.

11 JUDGE CABRANES: Who is Mr. Schwartz?

12 MR. LERNER: He was the general counsel of the company  
13 who I think I am -- shall I name the company here?

14 JUDGE CABRANES: Yes, I think so.

15 MR. LERNER: Bay Rock. He was the general counsel of  
16 Bay Rock. He disseminated when it was received, when that  
17 complaint was received from the attorney for Bay Rock. The  
18 firm was Akerman Senterfitt. Akerman Senterfitt, a Miami firm,  
19 represented Bay Rock. That complaint was provided as a  
20 courtesy to the Akerman Senterfitt firm with all of the  
21 exhibits.

22 That e-mail was then forwarded to Bay Rock's general  
23 counsel who disseminated it.

24 JUDGE CABRANES: Those exhibits of court documents  
25 included the presentence report?

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1 MR. LERNER: Included the presentence report.

2 JUDGE CABRANES: Anything else? Any of these other  
3 documents? Cooperation agreement?

4 MR. LERNER: The complaint, the cooperation agreement,  
5 and the criminal information.

6 So what's before the Court below --

7 JUDGE CABRANES: Well, you've submitted today a letter  
8 dated February 11 which I have not been able to fully digest  
9 shall we say. You know the letter I'm referring to.

10 MR. LERNER: Yes, if I may summarize it, simply  
11 indicating the attorneys with whom Mr. Roe has consulted with  
12 regard to various issues that are connected with this.

13 JUDGE CABRANES: Does the list of persons or the  
14 number of persons to whom you just referred as having received,  
15 electronically or otherwise, these documents, are they listed  
16 in your filing?

17 MR. LERNER: I don't think we mentioned Mr. Schwartz.

18 JUDGE CABRANES: Are you going to be able to give us  
19 that information in another letter?

20 MR. LERNER: I think we can supplement that. I  
21 indicated that it was to the best of our abilities at the time.

22 JUDGE CABRANES: But you think you will be able to do  
23 that, to supplement it as best you can?

24 MR. LERNER: I know that I provided full information  
25 as to who I personally disclosed it to.

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1 And that included --

2 JUDGE CABRANES: What about your client Richard Roe?

3 MR. LERNER: Mr. Roe, as he indicated in his  
4 declaration, to the best of his knowledge he has disclosed  
5 that.

6 JUDGE CABRANES: This letter to which I have just  
7 referred was submitted to the Court. Was it submitted under  
8 seal?

9 MR. LERNER: It was not.

10 JUDGE CABRANES: It was not. Was a copy conveyed to  
11 counsel for the government?

12 MR. LERNER: No. I indicated in the letter that I am  
13 providing privileged information, however, if the Court wishes  
14 to disclose it --

15 JUDGE CABRANES: I am a little confused. You didn't  
16 file it under seal. You didn't feel it was necessary to keep  
17 it from the world. You felt it was only necessary to keep it  
18 from the government. But, of course, they can go on the  
19 electronic site and print it out. So you don't mind if this is  
20 copied and given to the government?

21 MR. LERNER: I would not strongly object.

22 JUDGE CHIN: Was it filed electronically?

23 MR. LERNER: Actually, I did not know that it would be  
24 filed in the docket. I was asked by the calendar clerk to  
25 provide the letter by 5:00 p.m., and I faxed it directly to the

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1 calendar clerk.

2 JUDGE POOLER: Attached to your letter is the  
3 declaration of Richard Roe using his real name?

4 MR. LERNER: Yes.

5 JUDGE POOLER: Wasn't that a violation of previous  
6 orders?

7 MR. LERNER: I don't know that Roe could sign a  
8 declaration in the name of Roe. I don't know. As I indicated  
9 in my letter, I didn't know how to deal with that from a  
10 technical perspective.

11 JUDGE CABRANES: Inasmuch as you have no objection to  
12 sharing this letter of February 11 with the government, for the  
13 sake of expedition, I am going to give my copy to the clerk to  
14 pass it to the government, since we can get our own copy off  
15 the computer.

16 MR. LERNER: I would like to correct another statement  
17 that was made earlier, and then I would like to proceed with  
18 the argument.

19 The Court directly asked the government whether any of  
20 these documents are out in the public domain. The answer, and  
21 now that I can, I think I can fairly -- well, may I state a  
22 publication on the record as to where -- OK. Business Week  
23 published an article in 1998. That article is called, The Case  
24 of the Gym Bag that Squealed. That article indicates that  
25 Business Week has a copy of the complaint. That article is



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1 still up on the website.

2 I submit that if Business Week has the right, as they  
3 obviously do, to disseminate that complaint and to discuss that  
4 complaint, so too --

5 JUDGE CHIN: Did you say 1998?

6 MR. LERNER: Yes. And that article is still up.

7 JUDGE CHIN: And the complaint, which complaint are  
8 you talking about?

9 MR. LERNER: The complaint in the Eastern District  
10 action.

11 JUDGE CHIN: In the criminal case, OK.

12 MR. LERNER: The Eastern District action, the criminal  
13 case, yes. That article, which remains on the website,  
14 indicates that Business Week has a copy of the criminal  
15 complaint, which means that they got it from the government or  
16 they got it from the FBI. OK. So it is not --

17 JUDGE POOLER: Why does it naturally follow that they  
18 got it from the government or the FBI?

19 MR. LERNER: Well, one would presume that Mr. Doe did  
20 not give it to Business Week.

21 JUDGE POOLER: And Mr. Roe was not involved at that  
22 point?

23 MR. LERNER: No. Mr. Roe wasn't involved in anything  
24 related to Bay Rock until I believe he was retained to  
25 represent the aforementioned person or assist in prepping an

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1 individual for a deposition.

2 JUDGE POOLER: When was that? When did he come in  
3 contact with the facts of this case?

4 MR. LERNER: Well, he's been involved with the facts  
5 of the Bay Rock matter for about two years. He's been  
6 preparing a RICO complaint. It was only in March of 2010 that  
7 the employee at Bay Rock who Mr. Roe was assisting to prepare  
8 for a deposition said, I know you are working on this case,  
9 these documents might be of use to you.

10 JUDGE CABRANES: Can you set forth precisely how your  
11 client obtained the sealed presentence report, the cooperation  
12 agreement, and the other documents from those criminal cases?

13 MR. LERNER: Yes. There was testimony on the record  
14 that Mr. Row obtained them from that individual who he was  
15 assisting to prep for a deposition.

16 We supplemented that with e-mails that we submitted to  
17 the judge below. That indicated that these documents were  
18 maintained on the Bay Rock company's website -- I'm sorry,  
19 internal computer system.

20 Mr. Doe had directed that witness who I'm referring  
21 to, the deponent, as part of his job --

22 JUDGE CABRANES: Who was that witness?

23 MR. LERNER: May I state his name?

24 JUDGE CABRANES: Yes.

25 MR. LERNER: Bernstein, Joshua Bernstein.

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1           -- had instructed Joshua Bernstein to keep backup  
2 copies of all documents, all important documents.

3           So, these documents were on the Bay Rock server. Now,  
4 Mr. Doe testified below that he wasn't a partner in the  
5 company. He was a mere employee. There's nothing in the  
6 record to indicate that he had an expectation of privacy as to  
7 e-mails, e-mail documents maintained on the company server.  
8 But these documents were -- downloading these documents and  
9 archiving them and reviewing them was part of Mr. Bernstein's  
10 job.

11           JUDGE POOLER: Is that a public website or --

12           MR. LERNER: No, it is a private internal company  
13 website.

14           JUDGE POOLER: Right.

15           MR. LERNER: So it was obtained lawfully. And I will  
16 not point out that under the Pentagon papers case it is  
17 irrelevant whether the documents were obtained lawfully or  
18 unlawfully. They may be used and published as --

19           JUDGE POOLER: The PSR's have their own sealing  
20 regimen that does not relate to any order of the court.

21           JUDGE CABRANES: We are not dealing here with prior  
22 restraint of the press or the media. That's what the Pentagon  
23 papers case was about.

24           MR. LERNER: Well, your Honors, I would respectfully  
25 submit that petitioning the government for redress of

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1 grievances by filing a complaint in an action --

2 JUDGE CHIN: Do you acknowledge, right or wrong,  
3 whether the sealing order was correctly issued or not correctly  
4 issued, do you acknowledge that your client has to comply,  
5 subject to his right to appeal?

6 MR. LERNER: Your Honor, I am not certain which  
7 sealing order you're referring to.

8 JUDGE CHIN: Any order. If there is an order in place  
9 prohibiting him from disclosing certain things, do you  
10 acknowledge that he must comply with that order subject to his  
11 ability to appeal and get relief from a higher court?

12 MR. LERNER: May I read directly from the transcript  
13 below with respect to that issue?

14 JUDGE CHIN: I would like it if you would answer my  
15 question.

16 MR. LERNER: The answer to the question was answered  
17 on the record by Mr. Roe. He said, My understanding is that a  
18 sealing order is directed to court personnel and it is not an  
19 in personam -- it is not an order against other individuals.

20 JUDGE CABRANES: Judge Chin directed his question to  
21 you.

22 MR. LERNER: My answer is no, a sealing order is  
23 directed to court personnel. It is not directed to  
24 individuals. A sealing order may be accompanied by an  
25 injunctive order prohibiting speech.

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1 JUDGE CHIN: What is the point of a sealing order if a  
2 party could freely disseminate the document? It would  
3 completely undermine the point of the sealing order.

4 MR. LERNER: Judge Glasser stated on the record that  
5 there is no sealing order in the case, so he could not have  
6 violated a sealing order. Moreover, in the testimony, Mr. Roe  
7 stated, My understanding is that a sealing order is not an  
8 injunction, and he cited in his testimony a case called Roman  
9 Catholic Diocese, a Kentucky case, the Supreme Court. And  
10 Judge Glasser stated, Your understanding is correct.

11 JUDGE CABRANES: When Roe obtained these documents,  
12 were any of them marked in any way that suggested that they  
13 were under seal?

14 MR. LERNER: Not the criminal information, not the  
15 complaint, not the cooperation agreement. There were markings  
16 on the PSR. I don't recall the exact language of the PSR, but  
17 it is not a 65(d) injunction, which must be directed to  
18 specific individuals. It must state the basis for the  
19 injunction. It is not a court order directed to  
20 Mr. Oberland -- Mr. Roe.

21 JUDGE CABRANES: You can refer to him by name here.  
22 It's all right. We are all under seal here. But, of course,  
23 you may not believe in sealing orders. But you can feel free  
24 to refer to anyone here by the correct name or the code name,  
25 as you wish.

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1 MR. LERNER: Well, the PSR doesn't have injunctive  
2 language in accordance with Rule 65(d). Therefore, it is not  
3 subject to -- it is not an injunction. It could not bar the  
4 dissemination by Mr. Roe.

5 JUDGE CABRANES: Take 60 seconds and wrap up your  
6 argument.

7 MR. LERNER: Your Honors, we are here before the Court  
8 on a motion to seal the docket. There has been no record  
9 finding in support of the sealing of the docket. There's no  
10 evidence that has been submitted, there's argument, but no  
11 evidence to support the sealing of the docket. And in order to  
12 seal a docket, there must be on-the-record findings  
13 demonstrating its propriety. I would also like to state --

14 JUDGE POOLER: Don't we have an admission from Mr. Roe  
15 that he has these documents? Isn't that per se evidence?  
16 Isn't that enough?

17 MR. LERNER: To seal the appellate docket?

18 JUDGE POOLER: Yes. He has records that the judges  
19 thought were under seal already. He has them and admitted he  
20 has them.

21 MR. LERNER: Yes, he has them.

22 JUDGE POOLER: Why isn't that enough evidence to seal  
23 the record until further order of this court?

24 MR. LERNER: Because in Hartford Courant this court  
25 said it is inappropriate to seal an entire court docket.

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1 JUDGE POOLER: But that is also a newspaper case.

2 MR. LERNER: I would submit, your Honors, that under  
3 Citizens United all individuals have the same First Amendment  
4 rights. The Supreme Court stated it expressly. We no longer  
5 distinguish between newspapers and individuals.

6 JUDGE POOLER: But newspapers have a special charge in  
7 publishing information for citizens. Mr. Roe doesn't have any  
8 charge in making this information available to citizens.

9 MR. LERNER: Mr. Roe has the charge to represent his  
10 clients, who have the charge to represent, as they are acting  
11 in a fiduciary role, they represent they are acting  
12 derivatively and representing many investors. So he has a  
13 First Amendment right to use and publish these documents as he  
14 will.

15 Now I will state very directly, your Honor, the fact  
16 that this is not out in the public proves Mr. Roe's good faith.  
17 He has never circulated this publicly. He asserts his absolute  
18 right to do so, but he has not done so.

19 We ask that the Court abide by U.S. Supreme Court  
20 precedent, and if it is to hold that this proceeding is to be  
21 closed, that the docket is to be closed, that record findings  
22 be made on evidence, and there is no evidence here to support  
23 the burden of proof that is on the government.

24 JUDGE CABRANES: Let me ask you directly, you have  
25 filed a petition for certiorari with the Supreme Court?

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1 MR. LERNER: We have filed a petition to stay this  
2 proceeding. Every name that could give anyone notice as to  
3 what is going on here was redacted. I provided that to this  
4 Court in advance before filing it. I provided it to counsel in  
5 advance before filing it.

6 JUDGE POOLER: Did you file it at noon as you said you  
7 were going to do?

8 MR. LERNER: It was filed precisely at noon.

9 JUDGE CABRANES: Today?

10 MR. LERNER: No, it was filed at noon on Friday.

11 JUDGE CABRANES: Noon on Friday.

12 MR. LERNER: It was denied.

13 JUDGE CABRANES: It was denied already?

14 MR. LERNER: Yes.

15 JUDGE CABRANES: So there's nothing pending before the  
16 Supreme Court at this point?

17 MR. LERNER: That is correct.

18 JUDGE CABRANES: Lest there be any confusion, we think  
19 that you should make whatever arrangements are appropriate with  
20 the Clerk of the Supreme Court to make sure that this  
21 now-defunct proceeding remains under seal for the time being.  
22 That is for you to apply, and you can indicate to them on  
23 notice to the government that you are doing so at the request  
24 of the Court.

25 In any event, any further appeals to the Supreme Court



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1 should be, unless you hear otherwise from this Court, properly  
2 denominated as under seal. Is that understood?

3 MR. LERNER: Yes, absolutely, your Honor.

4 JUDGE CABRANES: It is so ordered.

5 JUDGE CHIN: Is it understood that it applies not just  
6 to Court personnel but to anyone with notice of it, including  
7 your client, without prejudice to your position, but otherwise  
8 we are going to be right back to square one.

9 MR. LERNER: I think we will understand it to mean  
10 that any petition will not be widely disseminated. It will go  
11 from my hands --

12 JUDGE CABRANES: Will not be disseminated, period.

13 MR. LERNER: Will not be disseminated, period. It  
14 will be in my hands, Mr. Roe's hands, counsel's hands.

15 JUDGE CABRANES: We will recess, and we may have  
16 something for you. We would like you to stand by, and we are  
17 going to consult with the Clerk of Court and others and we hope  
18 to have something for you promptly.

19 Thank you.

20 (Recess)

21 JUDGE CABRANES: It is 2:53 p.m. I have asked the  
22 clerk to enter an order that was entered formally at 2:45 p.m.,  
23 copies of which are being delivered at this very moment to  
24 those counsel who are present.

25 We will take a moment or two to review the order.

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1 Page 2 of course is a description of past proceedings.

2 Page 3 deals with the petition information, the writ  
3 of mandamus, which you will note has been denied, and the  
4 docket in that proceeding and all documents referenced therein  
5 shall remain sealed until further order of the Court.

6 On page 4 we turn to the request by the government for  
7 injunctive relief. There will be a remand to the district  
8 court for the limited purpose of enforcing this Court's orders  
9 and the related district court orders while the appeal goes  
10 forward on the merits. And the appeal will be expedited.

11 There is a briefing schedule on page 5. This is a  
12 remand under U.S. v. Jacobson. This panel shall retain  
13 jurisdiction over the pending appeal both for the disposition  
14 of the appeal on the merits as well as with respect to any  
15 further motions practice.

16 Any other appeals from the district court's order  
17 granting the permanent and temporary injunctions at issue and  
18 any appeals arising from any further proceedings in the  
19 district court, including any further petitions for  
20 extraordinary writs, including the writ of mandamus. It is so  
21 ordered.

22 Is there anything else anyone wishes to.

23 Why don't you come to the microphone so we can have  
24 the benefit of your comments?

25 MR. LERNER: The matter in the Southern District is

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1 presently stayed with an order to Mr. Roe to file a  
2 supplemental complaint upon the completion of the proceedings  
3 before Judge Glasser.

4 We understand that he's been enjoined from making any  
5 further applications. However, he would like to submit  
6 application to Judge Buchwald to request further --

7 JUDGE CABRANES: He has not been enjoined from making  
8 any further applications. You have misread this order. He has  
9 been enjoined from making any dissemination of any of these  
10 documents.

11 You can appear before Judge Buchwald at any time you  
12 think appropriate, and the only condition that I would place on  
13 that would be that you should, in making any presentation to  
14 Judge Buchwald, attach to any filing a copy of this order.

15 MR. LERNER: Thank you, your Honor.

16 JUDGE CABRANES: It is so ordered.

17 Yes? Any further applications or comments?

18 MS. MOORE: Your Honor, my name is Kelly Moore. I'm  
19 with the firm of Morgan Lewis & Bockius. We have been  
20 representing Mr. Doe for sometime now. Unfortunately our legal  
21 fees have gone through the roof on this matter, and a couple of  
22 months ago he retained a former colleague of mine, Mr. Beys, to  
23 represent him in connection with the Southern District.

24 JUDGE CABRANES: That's fine.

25 Let me just say I handled your application as a

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1 one-judge application, but frankly, not knowing what was going  
2 on at the time that your application arrived, I denied it  
3 without prejudice. I gather that you are now renewing your  
4 application to withdraw and to be substituted?

5 MS. MOORE: Yes, your Honor.

6 JUDGE CABRANES: The application is granted.

7 MS. MOORE: Thank you.

8 MR. BEYS: Thank you.

9 JUDGE CABRANES: Anything else?

10 Does the government need any comment or application?

11 MR. KAMINSKY: Very briefly, your Honor.

12 The government during the brief recess had an  
13 opportunity to first look at opposition's letter in terms of  
14 which further counsel they've spoken to and submitted the filed  
15 documents. The government is very concerned generally, but  
16 particularly concerned about one specific attorney who  
17 represents a large amount of individuals accused of being part  
18 of organized crime families.

19 JUDGE CABRANES: I don't mean to minimize the  
20 importance of what you are saying, but I think my colleagues  
21 will agree that your concerns should now be addressed to the  
22 district court. I think you will wish to contact Chief Judge  
23 Dearie to determine who exactly is going to handle the  
24 implementation of the court's mandate. And that judge can hear  
25 any concern or application by you with respect to that.

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1           On the other hand, you may wish to complete the record  
2 before our Court and state whatever you think appropriate. You  
3 may wish to include some of that in the briefing on the merits,  
4 but I think if you're asking for relief or you want to apply  
5 for relief in that regard, you should take it up in the Eastern  
6 District of New York.

7           Is that agreeable?

8           MR. KAMINSKY: Absolutely, your Honor. There was just  
9 more of a technical question of whether today's sealed  
10 proceeding would bar the government from speaking with one of  
11 those attorneys and asking for the documents back.

12          JUDGE CABRANES: No.

13          MR. KAMINSKY: Thank you.

14          JUDGE POOLER: Counsel, before you sit down, this  
15 matter before us was triggered by your motion for a temporary  
16 stay of the unsealing.

17          MR. KAMINSKY: Yes.

18          JUDGE POOLER: Do you have reason to believe that the  
19 documents were about to be unsealed?

20          MR. KAMINSKY: Yes.

21          JUDGE POOLER: What is the basis for that?

22          MR. KAMINSKY: We spoke to the Clerk of the Court here  
23 and we were informed that, unless someone makes a motion, it's  
24 going to be unsealed. It was sealed as a matter of course when  
25 the appeal was filed.

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1 JUDGE POOLER: That is, the appeal in this Court?

2 MR. KAMINSKY: Yes. Correct. That was sealed pro  
3 forma, and when we called to inquire about it they said not for  
4 long, so we made this motion.

5 JUDGE POOLER: Thank you. Thank you for clearing that  
6 up.

7 JUDGE CABRANES: Thanks very much. We are in recess.

8 (Adjourned)

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